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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1980

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner

v.

LOY D. ALCORN,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1. Is a railroad employee acting within the course and scope of his employment so as to subject his employer to liability under the Federal Employers' Liability Act when he perpetrates a practical joke for the purpose of scaring a co-employee?

2. Can failure to discipline constitute a basis for liability under the Federal Employers' Liability Act when there is no evidence that railroad officials had knowledge or notice of past rule violations?

LIST OF PARTIES

Petitioner — Missouri Pacific Railroad Company.[1]

Respondent — Loy D. Alcorn.

[1] In compliance with Rule 28.1 of the Rules of the Supreme Court of the United States, as amended, Petitioner sets forth the following list of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates: Parent — Missouri Pacific Corporation. Affiliate — Mississippi River Transmission Company. Subsidiaries (except wholly owned subsidiaries) — The Alton & Southern Railway Company; Arkansas & Memphis Railway Bridge and Terminal Company; The Belt Railway Company of Chicago; Brownsville & Matamoros Bridge Company; Chicago and Western Indiana Railroad Company; Galveston, Houston & Henderson Railroad Company; Great Southern Railroad, Inc.; Houston Belt & Terminal Railway Company; Illinois Terminal Railroad Company; Jefferson Southwestern Railroad Company; Kansas City Terminal Railway Company; The Pueblo Union Depot and Railroad Company; The Pullman Company; Southern Illinois and Missouri Bridge Company; Terminal Industrial Land Company; Terminal Railroad Association of St. Louis; Texas City Terminal Railway Company; Trailer Train Company; and The Weatherford, Mineral Wells & Northwestern Railway Company.

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, rendered on April 2, 1980, is reported at 598 S.W.2d 352.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas was entered on April 2, 1980. The Court of Civil Appeals denied Petitioner's Motion for Rehearing on April 23, 1980. The Supreme Court of Texas "refused, no reversible error," Petitioner's Application for Writ of Error on July 16, 1980, and overruled Petitioner's Motion for Rehearing on October 22, 1980, making final the decision of the Court of Civil Appeals.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(3), because a right specially set up and claimed under a statute of the United States is involved herein.

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is the Federal Employers' Liability Act, 45 U.S.C.A. §51, *et seq.* ("FELA"), which provides in pertinent part as follows:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

This suit was brought by Respondent under the Federal Employers' Liability Act, 45 U.S.C.A. §51, *et seq.* ("FELA") to recover from Petitioner ("Missouri Pacific") damages for personal injuries which he claims to have sustained as the result of an incident that occured on February 1, 1976. On that date, Respondent was working as a conductor on a Missouri Pacific train designated the Angleton Switcher. The Angleton Switcher had been traveling southbound on the main line toward Liverpool, Texas, but as it approached Liverpool it moved onto a siding track that was located east of the main line. While the Angleton Switcher was approaching, another Missouri Pacific train, the Amoco Switcher, was stopped on the main line, waiting for the Angleton Switcher to move into the siding.

While the Angleton Switcher approached, Edward D. Calloway, the fireman on the Amoco Switcher, placed approximately three to six "torpedoes" on the rail of the siding track. A torpedo is a small explosive device that is designed to be used as a railroad signal. In its proper use, a torpedo is placed on a rail of the track and is detonated when a wheel of the locomotive rolls over it. Upon hearing a torpedo detonate, the operator of the locomotive is supposed to immediately reduce the speed of his train and prepare to stop.

Missouri Pacific's Uniform Code of Operating Rules specifically provides that torpedoes are "not to be left at places where they may cause injury." In addition, Missouri Pacific's Uniform Code of Safety Rules provides that employees are to "use torpedoes . . . for signaling only. Care must be exercised to avoid injury from explosion or burning material." Finally, Rule N of Missouri Pacific's General Safety Rules provides that "Employees must not enter into altercations, play practical jokes, scuffle or wrestle on company property."

Mr. Calloway admitted that his conduct violated all of the above rules and that his sole purpose in placing the torpedoes on

the rail was to scare the crew members on the Angleton Switcher. Thus, by his own testimony, Mr. Calloway was not using the torpedoes for any purpose connected with the performance of his duties, but was instead simply playing a prank or practical joke on some fellow employees.[2]

As the Angleton Switcher approached the spot where the torpedoes were located (adjacent to the Amoco Switcher), Fred Bacoum, the engineer on the Amoco Switcher, tried to communicate with Respondent via the radio. However, the radio transmission was of such poor quality that Mr. Bacoum and Respondent were unable to communicate. According to Respondent and Mr. Calloway, Mr. Bacoum then motioned for Respondent to come over to the locomotive of the Amoco Switcher. Just as Respondent reached the ground after leaving the Angleton Switcher on his way to the Amoco Switcher, the wheels of the Angleton Switcher's locomotive detonated the torpedoes.

Respondent subsequently brought this action, claiming that he had sustained a disabling hearing loss as a result of this incident. The trial court awarded judgment in his favor in the sum of $351,500.00.

In response to Special Issues Nos. 1, 3, and 7, the jury found that Missouri Pacific was negligent in placing or in allowing the placement of the torpedoes on the track, that Respondent was on the ground near the torpedoes because of a signal from a Missouri Pacific employee, and that Missouri Pacific failed to provide Respondent with a reasonably safe place to work (App. E). Petitioner contends that there was no evidence to support the submission of those special issues nor to support the jury's findings in response thereto, because there was no evidence that Petitioner's employees were, within the meaning of the FELA, acting in the course and scope of their employment at the time of

[2] The fact that Mr. Calloway's conduct amounted to the simple perpetration of a practical joke has never been disputed by Respondent throughout the course of this litigation, and this interpretation of his conduct was expressly adopted by the Court of Civil Appeals in its opinion. 598 S.W. 2d at 353.

the occurrence in question. Petitioner first raised this contention when it objected to the trial court's charge submitting these Special Issues. The trial court overruled these objections (*see* App. F). Petitioner next raised this complaint in Points of Error Nos. 1, 2, 5, 6, 9, and 10 in its brief in the Court of Civil Appeals (App. G), and each of these Points was overruled. In the Texas Supreme Court, Petitioner raised this contention in Points of Error Nos. 1, 2, 5, 6, 9, and 10 (App. H), but the Texas Supreme Court denied Petitioner's Application for Writ of Error.

In response to Special Issue No. 5, the jury found that the railroad was negligent in failing to discipline its employees for the unauthorized use of torpedoes prior to February 1, 1976. Mr. Calloway testified that the use of torpedoes to play practical jokes had occurred in the past, but he could name only three employees (including the Respondent himself) who had done so. All three of those individuals denied ever having misused a torpedo. Mr. Calloway also testified that he had heard torpedoes go off in Missouri Pacific's yards prior to this incident, and that it is improper to make use of torpedoes in the railroad's yards. Six other Missouri Pacific employees agreed that they had heard torpedoes go off in yards, but, aside from Mr. Calloway, none of the ten Missouri Pacific employees who were called to testify at this case (*including* Respondent) could identify a single Missouri Pacific employee who had ever made unauthorized use of a torpedo prior to this incident. Furthermore, it was explained that outsiders (such as youngsters) are frequently seen trespassing inside the yards, and that the sounding of torpedoes can be attributed to their actions. There was absolutely no evidence adduced at trial indicating that any company official ever had knowledge of any Missouri Pacific employee misusing a torpedo prior to this incident. Therefore, Petitioner objected to Special Issue No. 5 on the ground that there was no evidence to support its submission (App. F), but the trial court overruled that objection. Petitioner's complaints on appeal (Point No. 7 in both the Court of Civil Appeals and the Texas Supreme Court) were likewise overruled.

REASONS FOR GRANTING THE WRIT

I. Course and Scope of Employment.

The Writ of Certiorari should be granted because the Court of Civil Appeals' holding runs contrary to every reported opinion dealing with this subject matter. Unless the judgments of the lower courts are reversed, this will be the first reported case in which a railroad has been held liable under the FELA for acts of horseplay on the part of its employees.

At least until this case, it was recognized as black letter law that the FELA does not make the railroad an insurer against personal injuries suffered by its employees. *See, e.g., Wilkerson* v. *McCarthy,* 336 U.S. 53, 61 (1949). Instead, a railroad is liable only in those cases in which injury to an employee results from the negligence of its employees acting within the course and scope of their employment. *See, e.g., Davis* v. *Green,* 260 U.S. 349, 352 (1922); *Copeland* v. *St. Louis — S.F. Ry.*, 291 F.2d 119, 121 (10th Cir. 1961); *Sheaf* v. *Minneapolis, St. P. & S.S.M. R.R.*, 162 F.2d 110, 113 (8th Cir. 1947).

This Court initially laid down its test for determining whether a railroad employee's act is within the course and scope of his employment in *Davis* v. *Green*, 260 U.S. 349 (1922). In a unanimous opinion authored by Justice Holmes, the Court held that the railroad was not liable under the FELA because the acts of the employee in question were not "done to further the master's businesses." *Id.* at 351. *See also Atlantic Coastline R.R.* v. *Southwell*, 275 U.S. 64 (1927). This Court has never departed from the standard set forth in *Davis* v. *Green* and, even in cases not directly involving a course and scope question, has frequently referred to the phrase "furtherance of the enterprise" as the touchstone for FELA liability. *See, e.g., Hopson* v. *Texaco, Inc.*, 383 U.S. 262, 264 (1966); *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 330 (1958).

In the case at bar, the Court of Civil Appeals simply refused to follow that standard. Instead, brushing aside all contrary

authority and citing no supporting authority (because there is none), the court ruled as follows:

> "It is uncontroverted that the crew of the Amoco Switcher was on duty at the time of the accident, and that the injury resulted from the negligence of one or more of them. [Respondent's] points of error relative to course and scope of employment are therefore overruled." 598 S.W.2d at 354.

Thus, in one fell swoop, the Texas Court of Civil Appeals overruled (or ignored) a continuing line of authority requiring that FELA liability be premised on conduct in furtherance of the railroad's business or enterprise and adopted a simplistic test imposing liability for all acts committed by employees while they are "on duty."

In addition to contradicting the writings of the Supreme Court in this area, the lower courts' ruling runs counter to the decisions of numerous federal courts of appeals and state appellate courts.

Perhaps nowhere is the conflict more evident than with the case of *Goupiel* v. *Grand Trunk Ry.*, 96 Vt. 191, 118 A. 586 (1922), which involved facts virtually identical to those presented in the case at bar. In *Goupiel*, the defendant railroad's fireman had placed a torpedo on a rail in order to play a practical joke on the plaintiff. He then motioned for the engineer to move the locomotive forward over the torpedo. The engineer, aware of the practical joke which the fireman had planned, obeyed the fireman's signal and ran his engine over the torpedo. The sole purpose of both the engineer and the fireman in exploding the torpedo was to startle the plaintiff and make him jump. Affirming an instructed verdict in favor of the railroad, the Vermont Supreme Court ruled that there was no evidence that the fireman and engineer were in the course and scope of their employment:

> This defendant was not an insurer against accidents occasioned by the unwarranted use of these explosives. It was only liable for the negligence of its servants in keeping or handling them when that negligence consisted of some act or omission within the scope of the servant's employment. *It*

> *is not enough that such act or omission occurred within the working hours of the servant, nor that he was at the time on duty.* If the act or omission complained of was done or omitted to carry out some direction of the master, express or implied, *in the furtherance of the work the servant was employed to do*, the master is chargeable for it; if it is done or left undone to effect some purpose of the servant alone, the master is not so chargeable. 111 A. at 587 (emphasis added).

It seems clear that the perpetration of the practical joke in the case at bar in no way "further[ed] the work the [Amoco Switcher crew] was employed to do" and that *Goupiel* would preclude the imposition of liability on Petitioner for such acts. Indeed, the courts which have addressed the question have unanimously ruled that a railroad cannot be held responsible under the FELA for the results of mere pranks played by its employees.

> Railroad employees injured as a result of horseplay or sportive conduct by another employee who have sought to recover for such injuries under FELA have almost uniformly been unsuccessful. It has been the accepted view that horseplay cannot possibly be in the furtherance of the employer's business, and that the employer cannot be held directly negligent for hiring playful employees. 2 Am. Jur. Trials 451.

Copeland v. *St. Louis — S.F. Ry.*, 291 F.2d 119 (10th Cir. 1961), for example, involved a plaintiff who was helping unload railroad ties from a boxcar. While he was in the process of balancing a tie on his shoulder and removing it from the car, a fellow employee who was working inside the car pushed upward on the back end of the tie, as a prank and practical joke. This caused the plaintiff to fall and sustain injuries. The Tenth Circuit upheld the district court's judgment in favor of the railroad, ruling that

> the acts of the fellow employee which caused Plaintiff's injury were wholly outside the scope of his employment, intended only to *further his own interests, and not those of his employer*, and were not chargeable to his employer. *Id.* at 112 (emphasis added).

In *Osment* v. *Pitcairn*, 349 Mo. 137, 159 S.W.2d 666 (1941), *cert. denied*, 317 U.S. 587 (1942) and 320 U.S. 792 (1943), the plaintiff, a railroad employee, was injured when a co-employee playfully seized him around the neck and shoulder and squeezed him so tightly that he lost consciousness, fell to the floor and fractured his skull. The plaintiff filed suit against the receivers of the railroad under the FELA. Ruling that the co-employee's act occurred outside the course and scope of his employment, the Missouri Supreme Court ruled that the trial court should have sustained the defendant's demurrer to the plaintiff's evidence.

> [The] assault being outside the scope of his employment, not in any manner in furtherance of the railroad's business, unauthorized and not directed, the trial court should not have submitted that assignment of negligence to the jury. *Id.* at 668.

In *Blunk* v. *Atchison, T. & S.F. Ry.*, 97 Cal. App.2d 229, 217 P.2d 494 (1950), the plaintiff's co-employee had placed a brake shoe inside the plaintiff's suitcase and had placed a glass tube underneath the suitcase as a roller to allow it to move as if it were not weighted. When the plaintiff reached for the suitcase to take it down from the rack, the heavy load threw him off balance and caused him to fall. The plaintiff brought suit under the FELA, and the trial court awarded a judgment in his favor. In reversing and rendering with directions to enter judgment for the defendant, the California Court of Appeals ruled:

> The placing of the brake shoe in the bag and the roller beneath it was a deliberate act. The practical joker was guilty of negligence, it is true, but it was not negligence for which the employer is responsible. It is, we think, beyond the bounds of reasonable inference to assume that the placing of the objects in and under the bag was done within the course and scope of an employee's duties. 217 P.2d at 495.

In *Popadines* v. *Davis*, 213 App.Div. 9, 209 N.Y. Supp. 689 (1925), a co-employee playfully pulled the plaintiff's cap over his face. When the plaintiff tried to pull the cap up, his feet slipped and he fell. The appellate court ruled that the railroad had no liability under the FELA because the co-employee was not

within the course and scope of his employment. Other authorities for the proposition that a co-employee's horseplay or sportive conduct is outside the course and scope of employment and does not render the railroad subject to liability under the FELA include the following: *Brooks* v. *Washington Terminal Company,* 593 F.2d 1285 (D.C. Cir.), *cert. denied,* 442 U.S. 910 (1979); *Sowards* v. *Chesapeake & O. Ry.,* 580 F.2d 713 (4th Cir. 1978); *Hoyt* v. *Thompson,* 174 F.2d 284 (7th Cir. 1949); *Sheaf* v. *Minneapolis, St.P. & S.S.M. R.R.,* 162 F.2d 110 (8th Cir. 1947); *Lavender* v. *Illinois Central R.R.,* 219 S.W.2d 353 (Mo. 1949); *Reeve* v. *Northern Pacific Ry.,* 114 P. 63 (Wash. 1914).

It is thus abundantly clear that the naked fact that Respondent's co-employees were "on duty" at the time in question is not dispositive of the course and scope question. Instead, the determining factor in FELA cases is whether or not the employees' conduct was in furtherance of the railroad's business. Common sense dictates that the perpetration of a practical joke on a co-employee, especially when that prank potentially involves an element of danger, does nothing to further the railroad's business. This common sense notion has been given the force of law by the numerous cases discussed *supra.* The opinion of the Court of Civil Appeals constitutes a dangerous assault on that rule of law and, unless reversed, will invite other courts to apply a mistaken course and scope standard in FELA cases. The Supreme Court should therefore grant the writ of certiorari, correct the Texas courts' rulings, and provide renewed support for the FELA course and scope test first set forth in *Davis* v. *Green.*

II. Failure to Discipline

Petitioner will make no attempt to hide the fact that the primary reason for granting the writ in this case is the Court of Civil Appeals' erroneous holding on the course and scope issue in direct conflict with several Supreme Court opinions, federal Circuit Court opinions, and state appellate court opinions. The lower court's holding on the failure to discipline issue, however, is equally erroneous and directly conflicts with the decision of

the federal court of appeals in *Brooks* v. *Washington Terminal Company*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 1910 (1979).

Edward D. Calloway, the perpetrator of the practical joke in this case, and, of course, not a company official, testified that the use of torpedoes to play practical jokes had occurred in the past, but each of the three employees he fingered denied having done so. Mr. Calloway also testified that he had heard torpedoes go off in Missouri Pacific's yards prior to this incident, but there was testimony explaining that trespassers are frequently seen inside the yards and that the sounding of torpedoes can be attributed to their actions. In other words, the mere sounding of a torpedo inside the yard does not mean that a Missouri Pacific employee was involved and certainly does not establish misuse of a torpedo by a particular employee who could then be the subject of company discipline. There was absolutely no evidence adduced at trial indicating that any company official ever had knowledge of any Missouri Pacific employee misusing a torpedo prior to this incident.

Mr. Kenneth M. Holloway, a company official, testified in detail regarding the discipline procedure in force at Missouri Pacific. He testified that when a rule violation occurs, the incident is investigated by a Missouri Pacific officer. If the situation warrants, a formal investigation is held, culminating in a hearing at which the employee is represented by a union official. If the formal investigation results in a determination that a rule was violated, then the appropriate type of discipline is ordered. Missouri Pacific investigates every alleged rule violation of which an officer obtains knowledge. However, because only officers can conduct the investigation and issue the discipline, the railroad is obviously unable to investigate those incidents which are not reported to officers. Therefore, if the incident justifying discipline (such as torpedo misuse) is not reported to a company officer, it is impossible for Missouri Pacific to order any discipline for such misuse. Since the record is completely devoid of any evidence of any Missouri Pacific official having knowledge of

an employee misusing a torpedo, there is no evidentiary ground on which the jury could properly base a finding that Missouri Pacific was negligent in failing to issue such discipline. In short, how can Missouri Pacific's officers be negligent in failing to discipline employees for misconduct which those officers had no knowledge was occurring? Obviously, they cannot be.

Precisely this conclusion was reached in *Brooks* v. *Washington Terminal Company*, 593 F.2d 1285, 1289-90 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979), a very recent FELA case in which the court made the following ruling:

> Plaintiff contends that negligence of the defendant could be found from a failure of the company to enforce its rule against use and possession of drugs. We cannot agree. Before failure to enforce a rule could give rise to liability, *there must be evidence*, as in the case cited by plaintiff, *of prior disregard of the rule, which would "warrant a finding of the defendant's knowledge of the practice* and of its negligence in the performance of its duty to enforce the rule." . . . There was no such evidence in this case. *Id.* at 1289-90 (emphasis added).

In the case at bar, there is absolutely no evidence of "prior disregard" of the torpedo rules. The mere sounding of torpedoes in yards where they could have been set off by anybody (including non-employees) does not rise to the level of constituting evidence of an actual rule violation. Moreover, there is nothing to "warrant a finding of [Missouri Pacific's] knowledge of the practice," as there is in fact a complete dearth of evidence that any company official knew of such actions. Therefore, the holding in the *Brooks* case directly conflicts with the ruling of the Texas Court of Civil Appeals and compels the conclusion that there is no evidence in the case at bar to support a finding of negligent failure to discipline.

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on January 20, 1981, three (3) copies of the foregoing Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to J. Donald Bowen, counsel of record for Respondent, at 2800 Two Houston Center, 909 Fannin Street, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

.....

BEN G. SEWELL

APPENDIX A

Opinion of Court of Civil Appeals

No. A2356

Affirmed, and Opinion filed April 2, 1980.

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant*

v.

LOY D. ALCORN, *Appellee*

APPEAL FROM THE 149TH DISTRICT COURT
OF BRAZORIA COUNTY

This Federal Employers' Liability Act (FELA) suit resulted in a jury verdict and judgment for the appellee in this suit complaining of a hearing impairment which the jury found was the result of a prank perpetrated by his fellow employees. We affirm.

Appellee, Loy D. Alcorn, a conductor on the Missouri Pacific Railroad's "Angleton Switcher" on February 1, 1976, was alighting from the train in a response to a hand motion of the engineer of another train, the "Amoco Switcher" to come to his locomotive, when he was subjected to the loud explosion of one or more torpedoes, or warning devices, which had been placed on the track as a practical joke by the fireman of the Amoco Switcher. He suffered much discomfort thereafter but continued to work until April 1978, when the appellant's chief physician ordered his removal from service because his hearing did not meet the minimum standards for continued employment.

The jury found that the defendant railroad failed to provide appellee with a safe place to work; it was negligent in allowing the placement of the torpedoes on the track; it was negligent in its failure to discipline its employees for the unauthorized use of torpedoes prior to the date of the accident; appellee was on the ground near the explosion as the result of a signal given to him by an employee of the defendant, such act of the employee being

negligent; and that each of these acts or omissions was a cause, in whole or in part, of appellee's injuries.

Appellant brings forward numerous points of error, foremost of which are allegations that each of the jury's findings set out above were erroneous in that there was no evidence that appellant's employees were acting within the course and scope of their employment at the time of the detonation of the torpedoes. In support of this view, appellant urges that the act of placing the torpedoes on the track was not committed for the purpose of furthering the railroad's business. Additionally, if the other employees of the Amoco Switcher knew that the torpedoes had been placed on the rail as a joke, then their acquiescence would amount to participation, and they, too, would be outside the course and scope of their employment. Also, if the engineer of the Amoco Switcher signaled to the appellee to come over to his locomotive it was for the purpose of offering him some clothes for his children, and, thus, likewise was beyond the course and scope of the engineer's employment.

A Texas appellate court which is reviewing the sufficiency of the evidence in a case brought under the FELA, 45 U.S.C.A. 51 *et seq.*, is required to adhere to the federal rule of evidence annunciated in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957), that if there be some creditable evidence to support the verdict nothing further is required. Event the slightest employer negligence that played any part in producing the injury complained of will suffice. "Stated another way, once the appellate court determines that the verdict is supported by some evidence about which reasonable minds could differ, the appellate court's function is exhausted." *Texas and Pacific Railway Company* v. *Roberts*, 481 S.W.2d 798, 800 (Tex. Sup. 1972). The FELA makes the railroad liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or *employees* of such carrier. . . ." U.S.C.A. §51. (Emphasis added). In interpreting this act the United States Supreme Court used the following language:

> . . . it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages. *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799, 803.

Judged by the standards set out above, therefore, if the appellee in this case introduced some creditable evidence that he was injured because of the negligence of a co-worker who was at the time under the railroad's control, this court's review is at an end. It is uncontroverted that the crew of the Amoco Switcher was on duty at the time of the accident, and that the injury resulted from the negligence of one or more of them. Appellant's points of error relative to course and scope of employment are therefore overruled.

Appellant further complains that Special Issue Number One did not inquire as to whether appellant was negligent, and that issue could have been answered in the affirmative even if the jury did not believe that appellant was negligent. The issue was framed as follows:

> INSTRUCTION NO. 1: You are instructed that it was the continuing duty of the Railroad, acting through its agents, officers and employees, at the time and place in question, to use ordinary care under the circumstances in furnishing Plaintiff with a reasonably safe place to work. This does not mean, of course, that the Railroad is an insurer of the safety of Mr. Alcorn. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be

performed is reasonably safe. The degree of care required to be exercised depends upon the risk or danger involved under the circumstances.

SPECIAL ISSUE NO. 1: Do you find from a preponderance of the evidence that the defendant railroad failed to provide plaintiff with a reasonably safe place to work on the occasion in question?

Answer "We do" or "We do not".

ANSWER: We do.

This instruction set forth the railroad's duty to exercise ordinary care under the circumstances, and failure to use ordinary care is the definition of negligence. The instruction is in accord with the mandate of Rule 277, Texas Rules of Civil Procedure, that "the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict. . . ." Appellant's point of error is ill-founded.

The final four of appellant's points of error deal with asserted error of the trial court in admitting or excluding certain testimony. We have carefully considered each of these points and find that error, if any, was harmless in that the rulings complained of were not calculated to cause nor did they probably cause the rendition of an improper judgment in this case. Rule 434, TEX. R. CIV. P.

The judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed April 2, 1980.

Panel consists of Chief Justice Brown and Associate Justices Miller and Salazar.

APPENDIX B

Judgment of Court of Civil Appeals

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1979, present Chief Justice Brown and Associate Justices Miller and Salazar

In the cause

No. A2356

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee.*

From Brazoria County
Tr Ct #78F0129
Opinion by AJ Miller

the following judgment was rendered on April 2, 1980:

"This cause, being an appeal from the judgment rendered by the court below and entered on August 2, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court be affirmed in all things. It is further ordered that the appellant, Missouri Pacific Railroad Company, and its surety, St. Paul Fire & Marine Insurance Company, pay all costs incurred by reason of its appeal. It is further ordered that this decision be certified below for observance."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of judgment entered herein by this Court in the above entitled

and numbered cause as appears of record in Minute Book 2, Page 578.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 24th day of December A. D. 1980.

THELMA MUELLER, Clerk

By: .....

APPENDIX C

Order of Court of Civil Appeals Overruling Motion for Rehearing

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1979, present Chief Justice Brown and Associate Justices Miller and Salazar

In the cause

No. A2356

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee,*

From Brazoria County
Tr Ct #78F0129
Opinion by AJ Miller

the following order was rendered on April 23, 1980:

"It is ordered that appellant's motion for rehearing be overruled."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 2, Page 589.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 24th day of December A. D. 1980.

THELMA MUELLER, Clerk

By: .....

APPENDIX D

Orders of the Supreme Court of Texas Refusing Application for Writ of Error and Overruling Motion for Rehearing

In the Supreme Court of Texas

No. B-9463

July 16, 1980

MISSOURI PACIFIC
RAILROAD COMPANY

v.

LOY D. ALCORN

From Brazoria County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Missouri Pacific Railroad Company and its surety, St. Paul Fire & Marine Insurance Company, pay all costs incurred on this application.

No. B-9463

October 22, 1980.

MISSOURI PACIFIC
RAILROAD COMPANY

v.

LOY D. ALCORN

From Brazoria County,
Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 24th day of December, 1980.

GARSON R. JACKSON,
Clerk

By ....., Deputy.

APPENDIX E

Excerpts from Charge of the Court

No. 78F0129

LOY D. ALCORN

v.

MISSOURI PACIFIC
RAILROAD COMPANY

In the District Court of
Brazoria County, Texas
149th Judicial District

CHARGE OF THE COURT

* * *

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the defendant railroad failed to provide plaintiff with a reasonably safe place to work on the occasion in question?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the defendant railroad, acting through its employees, was negligent in placing or in allowing the placement of the torpedoes on the track at the time and on the occasion made the basis of this suit?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the railroad was negligent for its failure to discipline, in any manner,

its employees for the unauthorized use of torpedoes on the Kingsville Division prior to February 1, 1976?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that Mr. Alcorn was on the ground near where the torpedoes exploded because of the request, direction or signal given to him by an employee of defendant?

Answer "We do" or "We do not."

ANSWER: .....

* * *

APPENDIX F

Excerpts from Defendant's Objections and Exceptions to the Charge of the Court

No. 78F0129

LOY D. ALCORN	In The District Court
v.	149th Judicial District
MISSOURI PACIFIC RAILROAD COMPANY	Brazoria County, Texas

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE CHARGE OF THE COURT

* * *

VII.

Defendant objects to Special Issue No. 5 for the reason that there is no evidence to warrant its submission nor to support an affirmative answer to it because there is no evidence that any official or officer of the railroad ever had notice of an employee using torpedoes in an unauthorized manner on the Kingsville Division prior to February 1, 1976.

* * *

X.

Defendant further objects to Special Issues No. 8, No. 7, No. 5, No. 3 and No. 1 on the basis that there is no evidence that any of the employees were in the course and scope of their employment at the time of the conduct inquired about.

MR. HOLLOWAY: That is all.

THE COURT: All right, the objections are all overruled.

THE STATE OF TEXAS
COUNTY OF BRAZORIA

I, John Waide, Official Court Reporter, 149th Judicial District of Texas, do hereby certify I was present in my official capacity at the time counsel for defendant dictated to me defendant's objections and exceptions of the court's charge in Cause No. 78F0129, Loy D. Alcorn vs. Missouri Pacific Railroad Company, on the docket of the 149th Judicial District of Texas, same being on the 19th day of July, 1979, and I reported in shorthand such dictation.

I further certify the foregoing pages numbered 1 through 6, inclusive, contain and constitute a full, true and correct transcript of my shorthand notes so taken as aforesaid.

WITNESS my hand this 13th day of December, 1979.

/s/ John Waide

APPENDIX G

Excerpts from Brief of Appellant Missouri Pacific Railroad Company in Court of Civil Appeals

No. A-2356

IN THE

Court of Civil Appeals

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee.*

BRIEF OF APPELLANT MISSOURI PACIFIC RAILROAD COMPANY

---

* * *

POINTS OF ERROR

Point of Error No. 1

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 9)

Point of Error No. 2

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO

SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 15)

* * *

Point of Error No. 5

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 3 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 10)

Point of Error No. 6

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 3 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH ANSWER. (TR 16)

Point of Error No. 7

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 5 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT ANY OF APPELLANT'S OFFICERS HAD KNOWLEDGE OR NOTICE OF THE UNAUTHORIZED USE OF TORPEDOES BY ITS EMPLOYEES ON THE KINGSVILLE DIVISION PRIOR TO FEBRUARY 1, 1976. (TR 10)

* * *

Point of Error No. 9

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE

ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 11)

Point of Error No. 10

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER IN RESPONSE TO SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 16)

* * *

APPENDIX H

Excerpts from Application for Writ of Error in Supreme Court of Texas

No. B-9463

IN THE
Supreme Court of Texas

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*
v.
LOY D. ALCORN, *Respondent.*

APPLICATION FOR WRIT OF ERROR

* * *

POINTS OF ERROR

Point of Error No. 1

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR. 9)

Point of Error No. 2

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 15)

* * *

Point of Error No. 5

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 3 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 10)

Point of Error No. 6

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 3 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH ANSWER. (TR 16)

Point of Error No. 7

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 5 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT ANY OF PETITIONER'S OFFICERS HAD KNOWLEDGE OR NOTICE OF THE UNAUTHORIZED USE OF TORPEDOES

BY ITS EMPLOYEES ON THE KINGSVILLE DIVISION PRIOR TO FEBRUARY 1, 1976. (TR 10)

* * *

Point of Error No. 9

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 11)

Point of Error No. 10

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER IN RESPONSE TO SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 16)

* * *